Supreme Court, U.S.
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OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MARTIN O'BRIEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 924(c)(1) of Title 18 of the United States Code provides for a series of escalating mandatory minimum sentences depending on the manner in which the basic crime (*viz.*, using or carrying a firearm during and in relation to an underlying offense, or possessing the firearm in furtherance of that offense) is carried out. The question presented here, as in *United States* v. *O'Brien*, cert. granted, No. 08-1569 (Sept. 30, 2009), is whether the sentence enhancement to a 30-year minimum when the firearm is a machinegun is an element of the offense that must be charged and proved to a jury beyond a reasonable doubt, or instead a sentencing factor that may be found by a judge by a preponderance of the evidence.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINION BELOW

The judgment order of the court of appeals (App., *infra*, 1a) is unreported. A related opinion of the court of appeals is reported at 542 F.3d 921.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 2009 (App., *infra*, 1a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Title 18 of the United States Code, Section 924(c)(1), provides:

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

* * * * *

(B) If the firearm possessed by a person convicted of a violation of this subsection—

* * * * *

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

STATEMENT

Following a guilty plea in the United States District Court for the District of Massachusetts, respondent was convicted of conspiring to affect commerce by robbery, in violation of 18 U.S.C. 1951; attempting to affect commerce by robbery, in violation of 18 U.S.C. 1951; and using and carrying a firearm during and in relation to, and possessing a firearm in furtherance of, a crime of

violence, in violation of 18 U.S.C. 924(c)(1). Judgment 1 (entered June 23, 2007). The district court orally pronounced a sentence of 180 months of imprisonment, which reflected concurrent 78-month terms of imprisonment on the conspiracy and attempted robbery counts, and a consecutive 102-month term of imprisonment on the Section 924(c)(1) conviction, all to be followed by three years of supervised release. Gov't C.A. App. 238. The district court's written judgment, however, reflected a sentence of "78 months on counts 1ss and 2ss to be served concurrently and 108 months [not 102 months] on Count 3ss to be served consecutively to the sentence imposed on counts 1ss and 2ss." Judgment 2.

As discussed in the United States' petition for a writ of certiorari in *United States* v. *O'Brien*, cert. granted, No. 08-1569 (Sept. 30, 2009) (*O'Brien I*), the district court determined that 18 U.S.C. 924(c)(1)(B)(ii) states an offense element that must be alleged in the indictment and proved to a jury beyond a reasonable doubt, rather than a sentencing factor to be decided by a judge by a preponderance of the evidence. The district court accordingly declined at sentencing to increase respondent's sentence under Section 924(c)(1)(B)(ii) because the firearm used, carried, and possessed was a machinegun. The government appealed the district court's refusal to impose the higher mandatory minimum term of imprisonment. That case was docketed in the court of appeals as No. 07-2312. The court of appeals affirmed and denied the government's petition for rehearing. The United States petitioned this Court for a writ of certiorari to review that judgment, which this Court granted. See *O'Brien I*, *supra*, No. 08-1569 (Sept. 30, 2009).

While the appeal in No. 07-2312 was pending, the district court entered a judgment for "Correction of

Sentence for Clerical Mistake (Fed. R. Crim. P. 36)." Am. Judgment 1 (entered Mar. 19, 2008). The amended judgment accurately reflects the 102-month term of imprisonment imposed for respondent's conviction under Section 924(c)(1). See *id.* at 2. Out of an abundance of caution, the government filed a notice of appeal from this amended judgment on March 28, 2008, see Dkt. 304, expecting that appeal to be consolidated with No. 07-2312. For reasons that are not apparent in the record, the government's notice of appeal was not immediately transmitted to the court of appeals. While the notice of appeal from the corrected judgment was pending in this manner, the court of appeals affirmed the ruling and denied rehearing in the original case (No. 07-2312).

On June 15, 2009, the clerk of the district court finally transmitted the notice of appeal from the amended judgment to the court of appeals. Dkt. 349. On July 9, 2009—after the United States had filed its petition for a writ of certiorari in this Court in *O'Brien I*—the corresponding appeal from the amended judgment was docketed in the court of appeals as No. 09-1893. The court of appeals issued an order inquiring whether No. 09-1893 was moot in light of the judgment in No. 07-2312. See 09-1983 Docket entry (1st Cir. July 21, 2009). The government responded by suggesting that the appropriate course would be to consolidate No. 09-1893 with No. 07-2312, and enter an opinion and judgment in No. 09-1893 in conformity with that in No. 07-2312. See 09-1983 Docket entry (1st Cir. July 24, 2009). The court of appeals agreed, and it consolidated the appeals and entered judgment in No. 09-1893 on August 17, 2009. See App., *infra*, 2a-3a (consolidation order); *id.* at 1a (judgment).

DISCUSSION

The government files this petition for a writ of certiorari to ensure that, if this Court decides *O'Brien I* favorably to the government, there will be no question that the Court has before it the operative judgment in respondent's case. Because the Court has at least one effective judgment before it in *O'Brien I*—that of O'Brien's co-defendant Arthur Burgess—its jurisdiction in *O'Brien I* is assured, and plenary consideration of this petition is unnecessary. Rather, this petition should be held pending decision in *O'Brien I*, and then disposed of accordingly.

CONCLUSION

The petition for a writ of certiorari should be held pending decision in *United States* v. *O'Brien*, cert. granted, No. 08-1569 (Sept. 30, 2009), and then disposed of accordingly.

Respectfully submitted.

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NOVEMBER 2009

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 09-1893
UNITED STATES OF AMERICA, APPELLANT
v.
MARTIN O'BRIEN, DEFENDANT-APPELLEE

Entered: Aug. 17, 2009
Pursuant to 1st Cir. R. 27.0(d)

JUDGMENT

In light of this court's order dated August 14, 2009, we grant the government's request to consolidate these two appeals. The judgment and opinion issued in 07-2312 will apply to 09-1893 as well.

By the Court:

/s/ Richard Cushing Donovan, Clerk

cc: Dina Michael Chaitowitz
Timothy Patrick O'Connell
Robert Edward Richardson

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 07-2312, 09-1893

UNITED STATES OF AMERICA, APPELLANT

v.

MARTIN O'BRIEN AND ARTHUR BURGESS,
DEFENDANTS-APPELLEES

Entered: Aug. 17, 2009

ORDER OF COURT

The government filed two notices of appeal, the first (07-2312) from the judgment entered on June 25, 2007 and the second from an amended judgment entered on March 19, 2008. No. 09-1893. By the time the second notice of appeal was docketed in the court of appeals, the first appeal had already been decided. *United States* v. *O'Brien*, 542 F.3d 921 (1st Cir. 2008). The government represents that the amended judgment in the district court simply corrected a typographical error and that no further proceedings in the court of appeals are needed with respect to the second appeal; indeed, the government intended its second notice of appeal to be an amended notice of appeal and did not expect a second appeal to be opened. In these circumstances, we grant the gov-

ernment's request to consolidate these two appeals. The judgment and opinion issued in 07-2312 will apply to 09-1893 as well.

By the Court:

/s/ Richard Cushing Donovan, Clerk

cc: Dina Michael Chaitowitz
Leslie Feldman-Rumpler
James Francis Lang
Timothy Patrick O'Connell
Robert Edward Richardson